144

144-658

RECORD, CASE No. 13,434.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 294.

JAMES W. KENDALL, ANNIE G. SHACKELFORD, RUAH E. DICKINSON, CAROLINE V. DICKINSON, J. C. DICKINSON, ELLAH DICKINSON, AND JOHN W. JACQUE, PLAINTIFFS IN ERROR,

vs.

THE SAN JUAN SILVER MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

FILED NOVEMBER 26, 1888.

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INDEX.

	Original.	Print.
Petition for writ of error	1	1
Order allowing writ of error	2	1
Writ of error	3	1
Return on writ of error	5	2
Affidavit as to service of copy of writ of error	6	3
Bond on writ of error	7	3
Citation	11	4
Proof of service of citation	12	5
Caption (omitted in printing)	13	—
Assignment of errors (omitted in printing)	15	—
Transcript from district court of San Juan Co.	16	5
Complaint	16	5
Summons (omitted in printing)	23	—
Sheriff's return (omitted in printing)	25	—
Answer	26	9

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 16, 1891.

	Original.	Print.
Reply	33	13
Stipulation as to facts	35	14
Motion for judgment	37	15
Judgment	38	15
Disclaimer (omitted in printing)	39	—
Appeal bond (omitted in printing)	40	—
Clerk's certificate (omitted in printing)	43	—
Joinder in error (omitted in printing)	44	—
Judgment	44	16
Opinion	46	17
Affidavits of value (omitted in printing)	56	—
Clerk's certificate (omitted in printing)	59	—
Assignment of errors (omitted in printing)	61	—
Designation by plaintiffs in error of parts of record to be printed	63	23
Assignment of errors	64	23
Affidavit of service of assignment of errors and designation of parts of record to be printed	66	24

1 STATE OF COLORADO:

In the Supreme Court.

JAMES W. KENDALL, ANNIE G. SHACKELFORD, RUAH E. DICKINSON, Caroline V. Dickinson, J. C. Dickinson, Ellah Dickinson, and John W. Jacque, Appellants,
v.
THE SAN JUAN SILVER MINING COMPANY, Appellees.

To the Hon. William E. Beck, chief justice of the said supreme court:

The petition of James W. Kendall, Annie G. Shackelford, Ruah E. Dickinson, Caroline V. Dickinson, J. C. Dickinson, Ellah Dickinson, and John W. Jacque respectfully represents to your honor that they were plaintiffs and appellants in the above-entitled cause, wherein judgment of this honorable court was given against them; that in the said cause there was drawn in question the validity of an authority exercised by your petitioners under the United States and the decision was against its validity; that in the said cause your petitioners claimed a title, right, and privilege under certain statutes of the United States and the decision of this honorable court was against said title, right, and privilege; that this honorable court is the highest court of this State in which a decision in the said suit can be had.

Wherefore your petitioners pray your honor to allow a writ of error from the Supreme Court of the United States for the removal of the record herein into the said Supreme Court for re-examination.

And, as in duty bound, your petitioners will ever pray.

WELLS, McNEAL & TAYLOR,
Att'ys for Petitioners.

2 On consideration of the within petition and on reading the record in the above-entitled cause it is ordered that a writ of error be, and hereby is, allowed according to the prayer of said petition.

Dated this Nov. 3, A. D. 1888.

WM. E. BECK,
Chief Justice Supreme Court of Colorado.

3 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Colorado, before you or some of you, being the highest court of law or equity of the said State of Colorado in which a decision could be had in the certain suit between James W. Kendall, Annie

G. Shackelford, Ruah E. Dickinson, Caroline V. Dickinson, J. C. Dickinson, Ellah Dickinson, and John W. Jacque, plaintiffs in error, and The San Juan Silver Mining Company, defendant in error, wherein was drawn in question a title claimed under a statute of the United States and an authority exercised thereunder and the decision was against the said title specially set up or claimed under said statute, manifest error hath intervened, to the great damage of the said James W. Kendall, Annie G. Shackelford, Ruah E. Dickinson, Caroline V. Dickinson, J. C. Dickinson, Ellah Dickinson, and John W. Jacque, as by their complaint appears, we, being willing that the error, if any, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court to be then and
4 there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the said Supreme Court, and the seal of our circuit court in and for the district of Colorado, the 3rd day of November, in the year of our Lord one thousand eight hundred and eighty-eight.

[Seal United States Circuit Court, District of Colorado]

WILLIAM A. WILLARD,
Clerk of the Circuit Court of the United States for the District of Colorado,
By F. W. TUPPER, *Deputy Clerk.*

Received a copy of the above writ of error for the defendants in error this 3rd day of November, A. D. 1888, and which is placed with the files in said cause on appeal in this court.

JAMES A. MILLER,
Clerk Clerk *Supreme Court of Colorado.*

5 THE UNITED STATES OF AMERICA, } *ss:*
State of Colorado, }

In obedience to the foregoing writ I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled cause, together with all things concerning the same, as designated in my certificate thereto attached.

Witness my hand and the seal of the supreme court of Colorado, hereto affixed at Denver, this 3rd day of November, A. D. 1888.

[Seal Supreme Court, State of Colorado.]

JAMES A. MILLER,
Clerk Supreme Court, Colorado.

6 UNITED STATES OF AMERICA,
District of Colorado, Arapahoe County, } ss:

Sam'l W. Wistrom, being first duly sworn, says on oath that on this 3rd day of November, A. D. 1888, he deposited with the clerk of the supreme court of the State of Colorado for the defendants in error in the above writ of error named a true copy of the said writ of error.

SAMUEL W. WISTROM.

Subscribed and sworn to before the undersigned, clerk of the supreme court of the State of Colorado, at said county of Arapahoe, this 3rd day of November, A. D. 1888. Witness my hand and the seal of said court the day & year aforesaid.

[Seal Supreme Court, State of Colorado.]

JAMES A. MILLER,
Clerk Supreme Court of Colorado.

7 Know all men by these presents that we, James W. Kendall, Thomas M. Trippe, E. W. Hunt, W. J. Forsyth, and F. C. Sherwin, are held and firmly bound unto the San Juan Mining Company in the penal sum of two thousand dollars ($2,000), to be paid to the said San Juan Mining Company, its successors and assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals this 29th day of October, A. D. 1888.

Whereas James W. Kendall, Annie G. Shackelford, Ruah E. Dickenson, Caroline V. Dickenson, J. C. Dickenson, Ella Dickenson, John W. Jaque are about to apply for a writ of error, issuing out of the Supreme Court of the United States and directed to the supreme court of the State of Colorado, to reverse a certain judgment heretofore and on or about the 12th day of November, A. D. 1886, rendered and given in a certain cause then and theretofore in the said supreme court depending between them, the said James W. Kendall,
Annie G. Shackelford, Ruah E. Dickenson, Caroline V. Dick-
8 enson, J. C. Dickenson, Ella Dickenson, John W. Jaque, and
the said San Juan Mining Company:

Now, if the said James W. Kendall, Annie G. Shackelford, Ruah E. Dickenson, Caroline V. Dickenson, J. C. Dickenson, Ella Dickenson, John W. Jaque shall prosecute their said writ of error to effect and answer all costs in case they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

J. W. KENDALL. [SEAL.]
THOMAS M. TRIPPE. [SEAL.]
E. W. HUNT. [SEAL.]
F. C. SHERWIN. [SEAL.]
W. J. FORSYTH. [SEAL.]

premises, to wit: That certain lode mining claim known, designated, and recorded as the "Bear" lode, situate on Kendall mountain, in the Animas mining district, county of San Juan and State of Colorado, and more particularly bounded and described as follows: Beginning at cor. No. 1, a post, thence, var. 14° 30′ east, the north peak of La Plata mountain bears S. 48° 05′ W.; also cor. No. 3, survey No. 96, bears N. 69° 40′ W. 668 ft., and the Seymour location monument bears N. 59° 08′ west 2,087.7 ft.; thence S. 70° 15′ east 1,500 ft. to cor. No. 2, a post, whence a cross chiseled on rock in place bears N. 68° 10′ E. 26 ft., and Mt. Canby bears east; thence N.
17 19° 45′ E. 300 feet to cor. No. 3, a post; N. 19 45′ E. 300 ft.
to cor. No. 3, a post; thence N. 70° 15′ W. 1,500 ft. to cor. No. 4, a post, also marked by a cross chiseled on rock in place; thence S. 19° 45′ W. 300 ft. to place of beginning, containing 10.3 acres, 750 ft. of said lode claim lying northwesterly and 750 lying southeasterly of the discovery shaft and notice on said lode.

II. That prior to the 3rd day of September, A. D. 1872, said mining claim and premises were a part of the public domain of the United States, unoccupied and unclaimed by any person, and were open to entry as mineral lands; and on the 3rd day of September, A. D. 1872, the said plaintiff James W. Kendall and one S. Sacket, both being citizens of the United States and over twenty-one years of age, entered upon and explored said premises and discovered said lode mining claim, and that the same contained silver & other valuable metals in rock in place; and on said day said Kendall and Sackett claimed and located said lode, claiming 1,500 feet linear and horizontal measurement thereon and one hundred feet in width on each side of the center of the vein on said claim as surface ground, and at the point where said locators discovered said lode they sunk a shaft and run drift or open cut the depth of ten feet, a sufficient depth to show and develope a vein bearing silver and other valuable minerals; and at the said point the said locators also within twenty days from the discovery of said lode erected a stake, set firmly in the ground or rock, upon which was designated the name of the lode, the names of the said locators, the number of feet claimed, to wit, 750 feet northwesterly and 750 feet southeasterly from said discovery shaft and notice, and that they claimed 100 feet in width on each side of the center of the vein on said claim as surface ground; and the said locators also within twenty days after the discovery of said lode distinctly marked the boundaries of their said loca-
18 tion, so that the same could be readily traced, and at each of
the corners of said claim the said locators within said twenty days drove posts and erected monuments of stones, and in all respects the said locators in locating and claiming said lode surface-ground complied with all the local rules and regulations of said Las Animas mining district and of the then Territory of Colorado and with the laws, rules, and regulations of the United States.

And within twenty days after the said discovery of said "Bear" lode and the location thereof in the manner as hereinbefore stated the said locators caused a written notice of their said claim to be filed in the office of the recorder of said Las Animas mining district, and said notice is found of record in Book 1, on page 206, of the records then kept by said recorder and which said book is now in the office of the recorder of the county of San Juan, State of Colorado, which said notice contained the names of the said locators, Kendall and Sackett; the date of the location, the number of feet claimed each way from the discovery shaft on said lode, and such a description of said claim by reference to a natural object as fully identifies the claim.

III. That ever since the said discovery and location of said claim the said locators, James W. Kendall and S. Sackett, and their grantees have continued to own, possess, occupy, and improve said "Bear" Lode mining claim and premises, and during each year since the said date of the discovery and location of said lode and mining claim the said locators and their grantees have expended on said lode, in work, labor, and improvements, not less than the sum of one hundred dollars for the purpose of working and developing said lode and for the purpose of maintaining their title thereto, and the said locators and their grantees have in all respects complied
19 with local rules and regulations of the United States in holding, occupying, and working said lode and mining claim.

IV. Plaintiffs further allege that the said plaintiff James W. Kendall claims the legal right to occupy and possess said mining claim as one of the original locators thereof and by virtue of having occupied and improved the same as hereinbefore set forth, and the other of said plaintiffs claim the right to occupy and possess said mining claim by reason of their having purchased their several interests therein from the locators and their grantees, and all of said plaintiffs claim the right to occupy and possess said mining claim by virtue of having complied with all the local rules and regulations of said mining district, of the Territory and State of Colorado, and of the laws and rules and regulations of the United States, and plaintiffs' claim is also by right of prior possession, and their title to said mining claim is absolute and perfect against every person except the United States, which still holds the fee-simple title thereto.

V. Plaintiffs further allege that on the 14th day of October, A. D. 1878, part of the then owners of the said Bear Lode mining claim made out and filed in the office of the recorder of said county of San Juan, State of Colorado, an additional certificate of location of said lode, in which was claimed 150 feet in width on each side of the center of the vein of said claim, whereby the side lines of said claim as originally located were each extended 50 ft.; wherefore these plaintiffs claim to hold, occupy, and possess said lode with 150 feet in width on each side of the center of the vein on said claim.

VI. Plaintiffs further allege that the said defendant is a corporation organized and existing under the laws of the State of Colorado.

20 VII. That the said defendant claims the right to occupy, possess, and hold the following part and parcel of the said Bear Lode mining claim, to wit:

Commencing at cor. No. 3 of the Titusville lode, thence N. 67° 30′ W. 120 ft. to northwest end line of the Bear lode; thence S. 19° 45′

W. 212 feet along the end line to cor. No. 1 of the Bear lode; thence S. 70° 15′ E. 1,188 feet along the southern side line of said Bear lode to the S. E. end line of said Titusville lode; thence N. 22° 30′ E. 154 feet along the said S. E. end line of said Titusville lode to place of beginning, viz., cor. No. 3 of the Titusville lode; and the said defendant claims said premises above described adversely to the claim, right, and title of the plaintiffs, and the said defendant claims the above-described premises as part and parcel of the so-called Titusville lode above mentioned, which the said defendant claims to be the owner of and to which, including the above-described premises, the said defendant has filed an application for a United States patent in the office*r* of the register and receiver of the U. S. at Lake City, Colorado, and *have* commenced the publication of notice of its said application in a newspaper published nearest to said Titusville lode.

VIII. That said last-described premises are a part and parcel of plaintiffs' said "Bear" Lode mining claim, and plaintiffs are entitled to the possession thereof as against defendant by virtue of prior right and possession; that the location of said Titusville lode (if any such location was ever made) was long subsequent to the location of the said "Bear" lode, and defendant has no right, title, or interest whatever in or to any portion of said "Bear" lode.

21 IX. Plaintiffs further allege that on or about the 23rd day of October, A. D. 1880, they caused to be filed in the said United States land office at Lake City, Colorado, an adverse claim against the application of said defendant for a U. S. patent for said "Titusville" lode, in which plaintiffs, as the owners of the said "Bear" Lode mining claim and premises, contest and dispute defendant's right or claim to that portion of said Bear Lode claim set forth and described in the seventh paragraph of this complaint and in which plaintiffs protest against the issuing of a patent to defendant covering or embracing any portion of said premises described in said seventh paragraph, and this action is brought for the purpose of settling and determining plaintiffs' right to the possession of said premises described in said 7th paragraph as against plaintiffs' claim thereto.

X. That in the preparation and filing of said adverse claim in said U. S. land office plaintiffs have disbursed and expended for plats, abstracts, and copies of papers filed with said adverse claim in said land office and for filing the same not less than one hundred dollars, and for counsel fees in the preparation of said adverse claim the sum of fifty dollars.

XI. Plaintiffs further allege that the said James W. Kendall claims an undivided one-third interest in said Bear lode by virtue of his said location thereof, and the said Annie G. Shackelford claims an undivided one-sixth of said Bear lode by purchase, and the said Ruah E. Dickenson claims an*d* undivided one-sixth interest in said Bear lode by reason of her being the sole heir-at-law of Wm. B. Dickenson, deceased; that the said Wm. B. Dickenson died in said county of San Juan in A. D. 1876, and at the time of his death he

was the owner by purchase of an undivided one-sixth interest in said Bear lode, and the said Ruah E. Dickenson was the sole surviving heir of the said Wm. B. Dickenson at the time of his
22–25 said death; and the said Caroline B. Dickenson, Ella H. Dickenson, and J. C. Dickenson claim an undivided four-fifteenth- ($\frac{4}{15}$) interest in said Bear lode as the sole surviving heirs of J. H. Dickenson, deceased; that the said J. H. Dickenson died on or about the — day of ——, A. D. 187–, and at the time of his death he was the owner by purchase of an undivided one-third interest in said Bear lode, and the said plaintiffs Caroline B., Ella H., and J. C. Dickinson were the sole surviving heirs of the said J. H. Dickenson, deceased; and the said John W. Jaque claims an undivided one-fifteenth ($\frac{1}{15}$) interest in said Bear lode by purchase from the said Caroline B., Ella H., and J. C. Dickenson.

Wherefore plaintiffs pray judgment:

1. That they be declared to be entitled to the possession of said premises described in the seventh paragraph of this complaint;
2. That they have judgment for the possession of said premises;
3. That they have judgment against defendant for the sum of one hundred and fifty dollars, the amount expended by plaintiffs in the preparation, filing, &c., of their said adverse claim;
4. And for the costs of this suit.

WILSON & FORD,
Att'ys for Pl'ffs.

No. 228. Complaint filed in district court this 20th day of November, A. D. 1880.

G. D. GOVE, *Clerk*,
T. A. GREATOREN, *Dep.*

* * * * * * *

26 STATE OF COLORADO, *County of San Juan*, } *ss*:

In the District Court of the 4th Judicial District of the State of Colorado in and for said County.

JAMES W. KENDALL *et als.*, Plaintiffs,
vs.
THE SAN JUAN SILVER MINING CO., Defendant. } Answer.

The defendant, answering the complaint of plaintiffs in the above-entitled cause, alleges:

I. It denies that the plaintiffs are or at any time before, at, or since the commencement of this action were the owners or entitled to the legal or other right to occupy or possess the premises described in the first paragraph of said complaint or any part or portion thereof.

II. It denies that on or prior to the 3rd day of September, A. D. 1872, the premises described in the 1st par. of said complaint or any part or portion thereof were a part of the public domain of the United States or that the same were then open to entry as mineral lands, and denies that on said 3rd day of September, A. D. 1872, or at

any other time or times whatsoever the said plaintiffs J. W. Kendall and one S. Sackett or any one else entered upon or explored said premises or claimed or located the same as the Bear lode or otherwise, or that they or any one else discovered said pretended Bear lode, or that the same contained silver or any other valuable minerals in rock in place or otherwise as described in the second paragraph of said complaint; that whether they, the said Kendall and Sackett, pretended or attempted to locate or claim a mineral lode location as mentioned and set forth in the second paragraph of said complaint this defendant has not and cannot now obtain
27 sufficient knowledge or information upon which to base a belief, but it wholly denies that any such lode claim as described in the 1st par. of said complaint was on the 3rd day of September, 1872, or at any other time located by said Kendall and Sackett or either of them or any one else on the unappropriated public domain of the United States.

III. That whether the said Kendall and Sackett or either of them did the work, erected the stake and notice, marked the boundaries and caused a notice of the said pretended Bear lode location to be filed in the office of the recorder of Las Animas mining district at the time or times or at any time as set forth in the second paragraph of said complaint this defendant has not and cannot now obtain sufficient knowledge or information upon which to base a belief, but defendant denies that such work, posting of notice, staking of boundaries, or recording of notice of location was done, if done at all, in conformity with all or any of the local rules and regulations of the Las Animas mining district or with the laws of the then Territory of Colorado or of the United States, and denies that the plaintiffs are entitled to the possession or occupancy or have any claim upon the premises described in the first and seventh paragraphs of said complaint or any portion thereof by right of actual prior possession or other possession of the same or otherwise.

IV. Defendant denies that the location of the Titusville lode was subsequent to the pretended location of the pretended Bear lode.

V. Defendant denies that since the date of the pretended discovery and location of the pretended Bear lode by the said James
28 W. Kendall and S. Sackett or any one else or since or before any date up to the time of any pretended entry or up to any other time the said Kendall and Sackett or their grantees were in the possession or occupancy or were entitled to the possession or occupancy of said premises or any part thereof by right of prior possession or by virtue of compliance by said Kendall and Sackett or either of them or their grantees with the local rules and regulations or with the laws of the State of Colorado or of the United States or otherwise.

VI. That whether or not the plaintiffs and their grantors have during each year since the said date of the pretended discovery and location of the Bear lode expended on said lode in work, labor, and improvements not less that the sum of $100 this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

VII. Defendant denies that plaintiffs have disbursed or expended in the preparation or filing of their adverse claim to the application of defendant for patent from the United States to the Titusville lode and for plats, abstracts, and copies of papers filed with said adverse claim or otherwise as set forth in the X par. of said complaint the sum of $100 or any sum.

VIII. That whether the plaintiffs claim the respective interests or any interest in said pretended Bear lode as mentioned in the XI par. of said complaint or whether the nature and extent of such pretented interests or claims to said pretended Bear lode are as set forth in said XI par. of said complaint defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

And for a further answer to said complaint defendant alleges:

29 I. That on the 3rd day of September, A. D. 1872, and for a long time before and since the premises described in said complaint were not unappropriated public domain of the United States and were not open to location and appropriation by any one, but that said premises and every part thereof, on said Sept. 3, 1872, and for a long time before and since, comprised a portion of a certain tract of land which by treaty between the United States and the Tabaguache, Muoache, Capoti, Menamuchee, Yampo, Grand River, and Uintah bands of Ute Indians, approved and duly proclaimed by the Pres. of the United States Nov. 6, 1868, was set apart as a reservation for the use of said Indians, and by the terms of said treaty the right to the use, occupation, and enjoyment of said premises was secured to said Indians.

II. That the said Indians' rights to said premises was not extinguished until March —, A. D. 1874.

And for a further answer and cross-complaint to the complaint of plaintiffs defendant alleges:

I. That on or about the 29th day of August, A. D. 1874, A. H. Kallenberg, W. H. Wallace, and I. G. Jackson, each and all of them being then and now citizens of the United States, entered upon the premises hereinafter more fully described, the same being then a part and parcel of the unoccupied and unappropriated public mineral domain of the United States, and discovered therein a mineral-bearing vein of ore; that within sixty days thereafter they, the said Kallenberg, Wallace, and Jackson, caused to be excavated and wrought in, upon, and along said vein a shaft, adit, open cut, and cross-cut to the depth and extent of more than ten feet, and thereby cut and exposed said vein at the depth of ten feet from
30 the lowest part of the vein of said lode at the surface, showing therein at said depth of ten feet a well-defined crevice of mineral in rock in place, carrying silver, lead, and other valuable ores, and within said sixty days they, the said locators, erected at the point of discovery on the said vein of said lode a plain sign or notice containing the name of said lode, to wit, the Titusville lode; the names of said discoverers, and the said date of discovery; and also within said period of sixty days they marked the surface

boundaries of said lode claim by erecting six substantial posts, one at each corner and one at the center of each side line thereof, and hewed on the sides thereof in towards the said claim; and thereafter and within three months from the said date of said discovery, to wit, the tenth day of September, A. D. 1874, they filed for record in the office of the county clerk and recorder of San Juan county, Colorado, a certificate of location of said Titusville Lode mining claim, which said certificate contained the said name of said lode, the said date of location, the said names of the locators thereof, the number of feet in length claimed by them on each side of the center of said discovery shaft, adit, open cut, and cross-cut, and the number of feet in width on each side of the center of the vein at the surface along its entire length, and the general course and direction of said lode as nearly as the same could then be determined, together with such description with reference to natural objects and permanent monuments as identified the same with reasonable certainty.

II. That the said locators of said Titusville lode and their grantees have expended on said lode in work, labor, and improvements during each and every year since the said date of location thereof and during each and every annual period since the first day of
January next subsequent to said date of location, to wit,
31 January 1st, A. D. 1875, the sum of not less than $100 for
the purpose of maintaining their title to said lode.

III. That said Titusville lode is situated in Las Animas mining district, in said county and State, and is more particularly bounded and described as follows, viz: Beginning at cor. No. 1, a post, thence a cross chiseled on rock in place bears N. 58° 30′ E. 4.3 ft., a prominent peak bears N. 83° 04′ W., cor. 1, survey No. 280, Bear lode, J. W. Kendall *et al.*, owners, bears S. 83° 04′ E. 328 ft., and the Seymore locating monument bears N. 54° 53′ W. 1,792.9 ft.; thence (var. 14° 30′ E.) S. 67° 30′ E. 1,500 ft. to cor. No. 2, a post; thence N. 22° 30′ E. 300 ft. to cor. No. 3, a post; thence Mt. Canby bears S. 89° E., a prominent peak bears S. 59° 26′ E., and a prominent cliff bears S. 34° 12′ E.; thence N. 67° 30′ W. 1,500 ft. to cor. No. 4, a post; thence 22° 30′ W. 300 ft. to place of beginning; contains 10.3 acres of surface ground, 500 feet on said claim running northwest and 1,000 ft. running southeast from the center of the said discovery working.

IV. That since the location of said Titusville lode claim as aforesaid and before the commencement of this suit such purchases and conveyances were made as that the legal title and right of possession of and to said lode was and is vested in this defendant.

V. Therefore this defendant claims the legal right to occupy and possess said lode claim and mining premises by virtue of a prior appropriation and discovery, and by virtue of purchase from such discoverers, and by virtue of full compliance by it and its grantors with the requirements of the statutes of the United States and the State of Colorado concerning mineral lands.

VI. That said defendant-, by virtue of the premises aforesaid, have since said discovery been in possession and are entitled to the possession of said mining claim and every part and portion thereof.

32 VII. That said Titusville lode embrases within its exterior boundaries all and singular the premises described and set forth in the seventh paragraph of said complaint, which said premises were and are the actual and lawful property of this defendant.

Wherefore defendant prays judgment—

1. That it be declared to be entitled to the possession of the premises described in the seventh paragraph — pl'ffs' complaint.
2. That it have judgment for the possession of said premises and every part thereof, and that pl'ffs be forever enjoined from asserting any claim whatsoever in or to said premises adverse to the def't.
3. That it be dismissed hence with its costs and charges in this behalf most unjustly expended.

HUDSON & SLAYMAKER,
Att'ys for Def't.

[Endorsed:] No. 228. Answer. Filed in my office this 4t- day of December, 1880. G. D. Gove, clerk.

33 STATE OF COLORADO,
County of San Juan, } *ss:*

In the District Court of the 4th Judicial District of the State of Colorado in and for said County.

JAMES W. KENDALL *et al.*, Pl't'ffs,
vs.
THE SAN JUAN SILVER MINING COMPANY, Defendant.

Now come the plaintiffs herein, and for reply to so much of defendant's answer as they are advised *and* is material to reply to deny—

1. That saisd premises in the complaint described and every part thereof on said September 2nd, 1872, and for a long time before and since comprised a portion of a certain tract of land which, by treaty between the United States and the Yabaguache, Unoche, Capote, Weenemuchee, Yampa, Grand River, and Uentah bands of Indians, approved and duly proclaimed by the President of the United States Nov. 6t-, 1868, was set apart as a reservation for the use of said Indians, and deny that the said right of said Indians to said premises was not extinguished until March, 1874.

And plaintiffs say that the said averments relating to said reservation and the rights of said Indians *is* immaterial as — the action, and that defendant cannot avail itself of said plea in this action; and plaintiffs deny that on or about the 29th day of Aug., A. D. 1874, A. W. Kallenberg, W. H. Wallace, and J. G.
34 Jackson, each and all of them being then and now citizens of the United States, entered upon the premises described in the answer, and deny that the same was then a part and parcel of

the unoccupied and unappropriated public mineral domain of the United States.

As to whether the defendant or those under whom it claims did any work whatever upon said so-called Titusville lode or did any of the matter and things set up in their answer to complete their title to the same these plaintiffs have no knowledge or information sufficient to base a belief upon.

And, having fully replied, plaintiffs here renew the prayer of their complaint.

WILSON & FORD,
Att'ys for Pl'ffs.

[Endorsed:] No. 228. Reply. Filed in my office this 5t- day of January, A. D. 1881. G. D. Gove, clerk.

35 STATE OF COLORADO, }
County of San Juan, } *ss:*

In the District Court of said County.

J. W. KENDALL *et al.*
vs.
THE SAN JUAN SILVER MINING COMPANY. } No. 228.

The following stipulation is agreed upon by and between the parties, and testimony relating to the matters herein referred to is waived and may be dispensed with upon the hearing and trial.

I. It is admitted that the "Bear" lode was located Sept. 3rd, 1872, and was duly recorded as stated in the complaint. It is admitted by the defendant that all the averments in paragraph II of the complaint are true, excepting the averment that the Bear Lode mining claim was at the date of its location "a part of the public domain of the United States and unoccupied & unclaimed by any person and was open to entry as mineral lands;" and excepting, further, that if the locators of the Bear lode were entitled to make any such location whatever of said premises or any part thereof they were not entitled on Sept. 3rd, 1872, or any time prior to June 15th, 1874, to locate a claim exceeding fifty (50) feet in width, and defendant therefore denies that plaintiffs are entitled to more than 50 feet in width, if they are entitled to anything.

It is further admitted that an additional certificate of location was filed, as stated in paragraph 5 of the complaint.

36 It is also admitted that the plaintiffs are the proper persons to maintain this suit, and proof of chain of title and production of conveyances and records is dispensed with.

It is further admitted that the allegations contained in paragraph 9 of plaintiffs' complaint are true.

II. It is further admitted that on the 29th day of August, A. D. 1874, A. H. Kallenberg, W. H. Wallace, and J. G. Jackson located the "Titusville" lode, and plaintiffs admit that all the matters and things stated in paragraph 1 of second defense and answer are true, excepting the statement that said "premises *was* then (Aug. 29th,

1874) a part and parcel of the unoccupied and unappropriated public domain of the United States," which last averment plaintiffs do not admit.

It is further admitted that since the respective locations of said "Bear" and "Titusville" lodes each of the claimants and their grantors have duly done and performed the annual assessment work, and neither party shall be required to introduce testimony relating to the annual expenditures required by law.

It is further agreed that the defendant named is the proper party defendant in this action, and that no proof of its chain of title to the "Titusville" lode or the production of conveyances or records showing such title shall be required.

H. B. WILSON, *Att'y for Pl't'ffs.*
HUDSON & SLAYMAKER,
Att'ys for Def't.

[Endorsed:] Stipulation. Filed in my office this 22nd day of August, 1881. G. D. Gove, clerk.

37 STATE OF COLORADO, } *ss:*
County of San Juan, }

In the District Court, 7th Jud. Dist., Sitting in and for said County and State.

JAMES W. KENDAL *et al.*, Pl'fts,
vs.
THE SAN JUAN SILVER MINING COMPANY, Def't.

The defendant in the above-entitled cause now comes and moves the court for judgment against the said plaintiffs in said cause and in its favor upon the pleadings, the stipulation as to facts agreed upon by the said parties therein, and the disclaimer filed by the defendant herein, for that, as appears by the said pleadings and said other papers on file in said cause, the defendant is entitled to the possession of the premises now in controversy in this case.

HUDSON AND SLAYMAKER,
Att'ys for the Def't.

Notice of above motion is hereby waived. June 27th, 1882.

[Endorsed:] Mo. for judgment. Filed June 27th, 1882. G. D. Gove, clerk. J. G. Heid, deputy.

38 District Court of the 7th Judicial District in and for San Juan County, Colorado, in Session, June Term, A. D. 1882.

THURSDAY, *June 29th*, 1882.

JAMES W. KENDALL *et al.*, Pl'ff-, } No. 228.
vs.
THE SAN JUAN SILVER MINING CO., Def't.

This day come the parties and their attorneys, and this cause came on for hearing upon the motions of the defendants for judgment in their favor in this cause upon the pleadings and stipulations herein and upon the disclaimer filed by the defendants herein, and the same was argued by counsel.

Upon consideration whereof the court does order and adjudge that said motion *is*, and the same hereby is, sustained; to which ruling — decision of the court the plaintiffs then and there excepted. Whereupon the court doth now order and adjudge that judgment be, and the same is hereby, entered therein for and in favor of the said defendants as to the premises now in controversy between the parties herein, and that the plaintiffs' said action be, and the same is hereby, dismissed, and the said plaintiffs ordered to pay the costs herein, taxed to $—, or in default thereof that execution issue therefore; to all of which judgment and decision of the court the plaintiffs excepted; and upon their motion the court does allow the plaintiffs 60 days from this date to prepare and file a bill of exceptions herein, and the plaintiffs having prayed an appeal in this cause to the supreme court of this State, the same is now by the court allowed, and the court does fix the amount of the bond for such appeal at the sum of $300. It is ordered that the sureties thereto be approved by the clerk of this court, and that plaintiffs have 60 days from this date

39–43 in which to prepare and file the same.

Signed by—

C. W. BURRES, *Judge.*

44 * * * * * * *

And on, to wit, the 12th day of November, A. D. 1886, the same being one of the juridical days of the special October, A. D. 1886, term of said supreme court—present, Honorable W. E. Beck, chief justice; Honorable Joseph C. Helm and S. H. Elbert, justices; Frederick Cramer, Esq., sheriff of Arapahoe county, by F. A. Richardson, bailiff, and James A. Miller, clerk—the following proceedings were had and entered of record in said cause, to wit:

45 JAMES W. KENDALL *et al.*, Appellants,
vs.
THE SAN JUAN SILVER MINING COMPANY, Appellee. } No. 1043.

Appeal from district court of San Juan county.

At this day, this cause coming on to be heard, as well upon the transcript of proceedings and judgments had in said district court in and for the county of San Juan as also upon the matters assigned for error herein, and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is no error in the proceedings and judgment aforesaid of said district court, it is therefore considered and adjudged by the court that the judgment aforesaid of said district court be, and the same is hereby, affirmed and stand in full force and effect, and that this cause be remanded to said district court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said district court in the cause, notwithstanding the said appeal.

It is further considered and adjudged by the court that said appellee do have and recover of and from said appellants its costs in this behalf expended, to be taxed, and that it have execution therefor; and let the opinion of the court filed herein be recorded.

And thereupon and on the day last aforesaid, to wit, the 12th day
of November, A. D. 1886, there was handed down for filing
46 by said supreme court its opinion; which said opinion was
filed on said day and is in words and figures as follows, to
wit:

KENDALL *et al.*, Appellants,
vs.
SAN JUAN SILVER M. Co., Appellee. } No. 1043.

Appeal from the district court of San Juan county.

It appears from the record that about the month of October, 1880, the appellee made its application in the U. S. land office in Lake city, Colorado, for patent to the Titusville Lode claim, situated in San Juan county, and that the appellants, on the 23rd of October, 1880, filed in said office their adverse calim, alleging that a certain portion of the premises sought to be patented by the appellee was covered by the Bear Lode claim, a prior location owned by the appellants.

The present action was afterwards instituted by the appellants in the district court of San Juan county in support of their adverse claim.

The complaint avers the location of the Bear lode by the appellants on the third day of September, 1872, by the sinking of a discovery shaft, the discovery of mineral, and the due performance of all the various acts necessary to perfect a mining location under the congressional and statutory laws and the local rules and customs; also that the claim was then open to entry as mineral land and was unoccupied and unclaimed by any person.

The performance of annual labor and all other acts necessary to
preserve said Bear lode from forfeiture are likewise averred.
47 The complaint states further that the Bear Lode claim as
originally located extended fifteen hundred feet in length
and one hundred feet in width on each side of the center of the vein, and so remained until the fourteenth day of October, 1878, when the owners filed an additional certificate of location in the office of the recorder of San Juan county, claiming one hundred and fifty feet on each side of the center of the vein.

It alleges that the Titusville lode is a junior location and includes within its boundaries a portion of the territory embraced in the Bear location.

From the description given in the pleadings of the portions of said claims which are in conflict it appears that the Titusville location includes twelve hundred feet in length of the Bear surface ground and in width covers more than the south half of said surface ground for said entire twelve hundred feet.

The plaintiffs further allege that they have expended the sum of one hundred and fifty dollars in the preparation and filing of their adverse claim, and they pray judgment for the possession of the premises, for the recovery of said sum of one hundred and fifty dollars, and for costs of suit.

The appellee's answer denies all the material allegations of the complaint and denies that the ground in controversy comprised part of the unappropriated public domain of the United States, and that it was open to location on the third day of September, 1872. It alleges that at that date it comprised a portion of a certain tract of land which by treaty between the United States and certain confederated bands of Ute Indians in Colorado, duly approved and afterwards, on November 6, 1868, duly proclaimed by the President
of the United States, had been set apart to the use and occu-
48 pancy of said Indians, and that the Indian title to said tract
of land was not extinguished until March, 1874.

The answer further alleges that if plaintiffs were entitled to make a location on said tract of land at the date mentioned they were not entitled to a location exceeding fifty feet in width.

And for further answer and cross-complaint the appellee alleges the location of the Titusville lode claim on the 29th day of August, 1874, together with the existence of all conditions and the performance of all acts necessary to constitute a valid location of the vein and territory described in the location certificate, including the premises in controversy, and prays judgment for the possession thereof and for costs.

To this pleading of the appellee the appellants filed a replication, traversing all its material allegations and denying, among other things, that at the date of the appellant's location the ground in controversy comprised a portion of the Ute Indian reservation, and that at the date of the appellee's location the ground in dispute was part and parcel of the unappropriated public domain.

Subsequently a stipulation signed by the attorneys of the contesting parties was filed in the cause conceding the truth of the allegations of the respective pleadings, and that both parties had complied with all the requirements of the law in respect to the location and development of their said claim as set forth in their pleadings, save only the allegations that at the time of their respective locations the ground in controversy was a part of the unappropriated public domain, open to location, and excepting further the right of
appellants, if entitled to locate a claim at all on said tract of
49 land on the third day of September, 1872, to locate a claim of
a greater width than fifty feet.

The next step in the cause was the filing of a motion by the appellee for judgment upon the pleadings, the stipulation of facts, and a disclaimer of the appellee filed upon the hearing of said motion. In the latter document the defendant disclaimed all right or title to that portion of the premises in controversy which comprised the center fifty feet or twenty-five feet on either side of the center line of the Bear Lode location.

Upon the hearing of this motion it was sustained by the court and the action of the appellants dismissed. Judgment was also entered in favor of the appellee for the premises then remaining in controversy between the parties and for the costs of suit; to all of which rulings the appellants duly excepted.

Beck, *C. J.:*

The appellants assigned for error the allowance of the motion for judgment on the pleadings, stipulation of facts, and disclaimer; also that the court erred in rendering judgment in favor of the appellee.

The grounds of error alleged are that the stipulation of facts and the disclaimer were not instruments in the nature of pleadings, but matters only cognizable as evidence; hence that they could not be properly considered upon a motion, but only on a trial of the issues joined. We are of the opinion that this proposition is unsound.

One of the most important objects of the present system of pleading is to compel the parties to make their issues cover the real facts in dispute, so that neither party shall be subjected to the trouble and expense of proving what is not in fact disputed. It requires that the real matter in controversy shall be brought clearly before the court, and that the precise points, both of fact and of law, involved shall be disclosed before the trial is entered upon.

50 Another advantage claimed is that it may be known from an inspection of the respective statements of the parties whether, if duly proven, they warrant any relief upon the complaint or cross-complaint, and whether there be a legal defense to the action.

It is true by the original pleadings in this case the objects sought to be attained by the code provisions were defeated, for the pleadings of each party denied every allegation of the other, regardless of truth, with one or two immaterial exceptions.

But the filing of the stipulation of facts operated as a waiver of the numerous traverses and narrowed the issues to three questions of law and fact. These questions were:

First. Was the territory in dispute open to location as mineral land under the laws of the United States on the 3rd day of September, 1872?

Second. If it was open to location at that date were the plaintiffs then entitled, under the law, to locate a claim exceeding fifty feet in width?

Third. Were the premises on the 29th day of August, 1874, when the defendant's location was made, a part of the unappropriated public domain, open to location as mineral land?

The position assumed by appellants' counsel is that the issues were not modified by the filing of these papers, but remained for trial as originally framed; that the courts could not take judicial notice of instruments or papers of this character waiving legal rights, although executed by the parties themselves and duly filed in the cause, but that the issues thus attempted to be waived should have been disposed of on trial of the cause by producing the said stipulations in evidence.

51 The fallacy of these propositions is apparent. The filing of the stipulation and disclaimer wholly withdrew the matters therein mentioned as being conceded or waived from the consideration of the trial court.

These matters were no longer in the case. Thereafter all the allegations concerning the location of the Bear and Titusville lode claims, the dates of locations, the expenditures made, the work done, and the various acts performed in compliance with the mining laws and with the local rules and regulations, stood untraversed.

There remained no issues for trial requiring the production of evidence, and it would have been an idle ceremony to have empannelled a jury to witness the disposition of the case by the presiding judge upon considerations of law and fact whereof he was bound to take judicial notice.

It is true that the complaint alleged that at the date of the location of the Bear lode, September 3, 1872, the premises in controversy were unoccupied and unclaimed mineral lands of the public domain; that the answer alleged that the premises at that time comprised a part of a certain tract of land set apart as a reservation for the confederated bands of the Ute Indian nation by virtue of a treaty made and concluded between the United States and said Indian tribes, duly accepted and ratified and confirmed by a proclamation of the President of the United States issued on the sixth day of November, 1868; that the Indian title to said reservation, including the premises in controversy, was not extinguished until the month of March, 1874, and that on the 29th day of August, 1874, the
52 date of the appellee's location of the premises in controversy
as part of the Titusville Lode claim, the same was then a part of the unoccupied and unappropriated mineral domain of the United States; also that the replication denied these averments of the answer.

It is likewise true that the issuable facts just mentioned were not in any manner affected by the making and filing of the stipulations; but all the facts involved in these issues were of that character the existence of which courts are bound to take judicial cognizance. The ultimate rights of the parties, therefore, depended upon judicial conclusions to be drawn from a consideration of all truthful allegations of fact, whether traversed or untraversed, in connection with the implied propositions of law necessarily arising out of these several propositions of fact.

For example, although the plaintiffs in the location of the Bear lode performed every act necessary to constitute a valid location of a mining claim, yet if the territory upon which these acts were performed did not comprise a portion of the unappropriated public domain open to location as mineral land the work done and expenditures made secured no rights to the locators thereof.

The question of right depended upon the truth of the allegations concerning the existence, date, boundaries, and terms of the original treaty with the Indians and the truth of the allegations concerning the alleged relinquishment of the Indian title to that portion thereof which included the premises in controversy considered with reference to the law arising upon such facts.

As before stated, these were matters concerning which the courts take judicial notice. The treaties mentioned were incorporated with the laws enacted by Congress in the statutes at large of the United States.

See Stat. at Large U. S. (1868), title "Treaties," page 119; also—
Ib., vol. 18, part 3, page 36.

53 The accepted doctrine is that the Constitution and laws of the United States and all treaties made under the authority of the United States constitute the supreme law of the land, and the judges in every State are bound thereby and will take judicial notice of their provisions.

Art. VI, sec. 2, Const. U. S.
1 Greenleaf Ev., secs. 5, 490.
Bliss Code Pl., sec. 185.

Courts also take judicial cognizance of the civil divisions within a State of counties, townships, and towns and of the existence and general location of places referred to in the pleadings, and if within the jurisdiction of the court the county to which they belong.

Bliss Code Pl., secs. 186, 189.

Exercising such cognizance, the court had judicial knowledge that the contested facts were as alleged in the defendant's answer—that is to say, at the time of the plaintiffs' location of the Bear Lode claim the ground claimed was within the Indian reservation, but that the Indian title thereto had been extinguished prior to the location of the Titusville lode by the defendant. All propositions of fact bearing upon the case were, therefore, legitimately before the court on the motion for judgment, and it only remained for the court to construe the propositions of law arising thereon in order to pronounce judgment. The real issues, then, or questions to be decided being purely legal, it was unnecessary to assign the case for trial, and they were properly decided on the defendant's motion for judgment.

Was the plaintiff entitled to judgment for any portion of the premises in controversy?

54 It is clear that unless a valid location of a mining claim can be made upon territory while it constitutes part of a reservation set apart by treaty for the exclusive use of an Indian nation the plaintiff acquired no rights whatever by his location of September 3, 1872, and this is the only location asserted by him.

By the treaty proclaimed November 6, 1868, the United States solemnly agreed that the district of country therein described "shall be, and the same is hereby, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and the United States now solemnly agree that no persons except those herein authorized so to do and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law shall ever be permitted to pass over, settle upon, or reside in the territory described in this article except as in this article herein otherwise provided."

There is no provision excepting any part of the territory included within the bounds of the reservation for occupation or location for agricultural or mining purposes by white persons.

It has been decided by the Supreme Court of the United States that in the prosecution of an adverse claim to a mineral location the plaintiff must show such a location as entitles him to possession of the ground claimed as against the United States as well as against the other claimant; that if it is not valid as against the one it is not as against the other, and that he must establish a possessory title in himself good as against everybody.

Gwillim *vs.* Donnelan, 115 U. S., 45.

The effect of the treaty was to withdraw the whole of the land embraced within the reservation from private entry or appropriation, and during its existence the Government could not
55–62 have authorized the plaintiffs to enter upon the ground in
controversy for the purposes of discovering and locating a mining claim. On the contrary, the Government stood pledged to prevent its citizens from entering upon the reservation for any such purposes.

The right to locate mineral lands of the United States is declared to be a privilege granted by Congress. No such grant, including the premises in controversy, existed at the time of the plaintiffs' location. It is also held that a location to be effective must be good at the time it was made, and that it cannot be good when made if there is then an outstanding grant of the exclusive right of possession to another.

The possession of the plaintiffs at the time of their location of the Bear lode was tort*ious*. Such being the character of their possession, and assuming to locate a claim not only without legal authority but in violation of law, the attempted location was a nullity. It was just as if it had never been made.

U. S. *vs.* Carpenter, 111 U. S., 47.
Belk *vs.* Meagher, 14 Otto, 279.

The foregoing objections do not attach to the defendant's location of the Titusville lode. This location, made after the Indian title was extinguished, was conceded to be regular in all respects, save as to the defendant's allegation that the premises comprised a part of the unappropriated public domain open to location as mineral land. This allegation was traversed merely, the only effect of which was to assert priority of appropriation by the plaintiffs. The plaintiffs' claims having failed, the judgment of the court was correct.

Judgment affirmed.

* * * * * * *

63 In the Supreme Court of the United States.

JAMES W. KENDALL, ANNIE G. SHACKELFORD, Ruah E. Dickinson, Caroline V. Dickinson, J. C. Dickinson, Ellah Dickinson, and John W. Jacque, Plaintiffs in Error, *v.* THE SAN JUAN SILVER MINING COMPANY, Defendant in Error.	Error to the Supreme Court of the State of Colorado.

The said plaintiffs in error suggest and show that hereunto attached is an assignment of the errors upon which the said plaintiffs in error intend to rely herein, and, in pursuance of the rule in such case made and provided, the said plaintiffs in error show that the following parts of the record are necessary for the consideration thereof, to wit:

First. The complaint of the plaintiffs filed in the district court of the county of San Juan, in the State of Colorado.

Second. The answer of the defendant to the said complaint.

Third. The reply of the plaintiffs to the said answer.

Fourth. The agreed state of facts filed in the district court aforesaid on the 22nd day of August, A. D. 1881.

Fifth. The motion of said defendant for judgment.

Sixth. The judgment of the said district court.

Seventh. The judgment of the supreme court of the State of Colorado, entered on the 12th day of November, A. D. 1886, affirming the judgment of the said district court.

Eighth. The opinion of the supreme court of the State of Colorado.

E. T. WELLS,
R. T. McNEAL,
Attorneys for Plaintiffs in Error.

64 In the Supreme Court of the United States.

JAMES W. KENDALL, ANNIE G. SHACKELFORD, RUAH E. DICKINSON, Caroline V. Dickinson, J. C. Dickinson, Ellah Dickinson, and John W. Jacque, Plaintiffs in Error,
v.
THE SAN JUAN SILVER MINING COMPANY, Defendant in Error.

Error to the supreme court of the State of Colorado.

And the said plaintiffs in error, by E. T. Wells, their attorney, come now and say that in the record and proceedings of the supreme court of the State of Colorado manifest error hath intervened in this, to wit:

First. That the said supreme court of the State of Colorado affirmed the judgment of the district court of the State of Colorado in and for the county of San Juan, in said State, whereas, by the law of the land, the judgment of the said district court ought to have been reversed.

Second. It appears by the record aforesaid that the premises in controversy in the said action were located and claimed as a mining claim in the public domain of the United States by the said James W. Kendall and another, citizens of the United States, while the said lands were included within the limits of a certain reservation set apart by treaty between the United States and certain confederated bands of the Ute Indians as a reservation for the use of said Indians, but that said confederated bands of the Ute Indians in whose behalf the said reservation was made ceded to the United States that part of said reservation including the premises in question, in the month of March, A. D. 1874, and that after such cession and the extinguishment of
65 the Indian title to the said lands the said James W. Kendall
and the other plaintiffs in error still continued in possession of the said premises, occupying, working, and improving the same and claiming the same as a mining claim in the public domain of the United States under the acts of Congress in such case made and provided, and that no claim or right of the said defendant in error or any — its grantors was initiated or asserted to said premises until about the month of August, A. D. 1874; nevertheless the said supreme court of the State of Colorado gave judgment in favor of the said defendant in error solely on the ground that at the date of the said original location the said premises were part of the Indian reservation aforesaid, and denied the right, privilege, and immunity claimed by the said plaintiffs in error under the acts of Congress in that behalf aforesaid; whereas by the law of the land, the said plaintiffs in error and their grantors remaining in possession of the said premises and claiming the same as a mining claim in the public domain of the United States under the acts of Congress in that behalf allowing the exploration and occupation of mineral claims in the public domain of the United States subsequent to the cession of the said premises by the Indian bands aforesaid were well and sufficiently entitled thereunto.

Wherefore, for the errors aforesaid and the manifold other error- in the said record and judgment appearing, the said plaintiffs in error pray that the judgment aforesaid may be reversed, annulled, and in all things held for naught, and that they be restored to all things which by virtue thereof they have lost, and they also pray judgment for their costs.

E. T. WELLS,
R. T. McNEAL,
Att'ys for Plaintiffs in Error.

66 UNITED STATES OF AMERICA,
State and District of Colorado, County of San Juan, } *ss:*

Thomas M. Trippe, being first duly sworn, on oath deposes and says that on the 27th day of November, A. D. 1888, at Silverton, Colorado, he delivered to James H. Robin, agent of N. E. Slaymaker, Esq., one of the attorneys of the San Juan Silver Mining Company in the case hereinabove mentioned and lately pending in the supreme court of the State of Colorado, a true copy of the above assignments of error and statement of the parts of the record necessary for the consideration thereof, subscribed by E. T. Wells & R. T. McNeal, attorneys for the said plaintiffs in error therein named. The said N. E. Slaymaker being absent from Silverton, the said copy was delivered to his agent, James H. Robin, at his office, in Silverton, Colorado.

THOMAS M. TRIPPE.

Subscribed and sworn to before me, a notary public in and for the county of San Juan and State of Colorado, at said county of San Juan, this 27th day of November, A. D. 1888.

Seal C. M. Frazier, Notary Public, Silverton, Colo.

Witness my hand and notarial seal the day and year aforesaid.

C. M. FRAZIER,
Notary Public.

Commission expires Nov. 1st, 1891.

[Endorsed :] Sup. Court U. S. 1888, Oct'r term. No. 294 James W. Kendall *et al.*, pl'ffs in error, *vs.* The San Juan Silver Mining Co. Statement of errors and designation by pl'ffs in error of parts of record necessary to be printed.

[Stamped :] Office Supreme Court U. S. Filed Dec. 5, 1888. James H. McKenney, clerk.

Endorsed on cover : Case No. 13,434. Colorado supreme court. No. 294. James W. Kendall, Annie G. Shackelford, Ruah E. Dickinson, Caroline V. Dickinson, J. C. Dickinson, Ellah Dickinson, and John W. Jacque, plaintiffs in error, *vs.* The San Juan Silver Mining Company. Filed November 26, 1888.

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In the Supreme Court of the United States, October Term, 1891.

J. W. KENDALL *et al.*, Plaintiffs in Error,
vs.
THE SAN JUAN SILVER MINING COMPANY.
} No. 294.

Stipulation.

It is this day stipulated that the paper hereto attached, being copy of a certain disclaimer filed in the above-entitled cause, as certified by the clerk of the supreme court of the State of Colorado to be a true copy, having been omitted from the transcript of record filed in said court in the above-entitled cause, be now printed and considered by the Supreme Court of the United States as a part of the original transcript on writ of error to said court herein.

E. T. WELLS,
ROB. T. McNEAL,
Att'ys for Plaintiffs in Error.
A. T. BRITTON,
A. B. BROWNE,
Att'ys for Def'd- in Error.

STATE OF COLORADO,
County of San Juan, } *ss:*

In the District Court of the 7th Judicial District in and for said Co.

J. W. KENDALL *et al.*, Plaintiffs,
vs.
THE SAN JUAN SILVER MINING CO., Defendant.
} Disclaimer.

Now, on this day, comes the def't, by its att'ys, Hudson & Slaymaker, and disclaims any right or title of possession to that part and parcel of those certain premises described in the complaint of pl'ffs herein as constituting the "Bear" lode, bounded and described as follows: Beginning at cor. No. 3 X, Titusville lode, thence S. 22° 30′ W. 30.3 ft. to p't; thence N. 70° 15′ W. 1,191.37 ft. to p't; thence N. 19° 45′ E. 50 ft. to p't; thence S. 70° 15′ E 774.88 ft.; thence S. 67° 30′ E. 418.45 ft. to place of beginning, containing 1.278 acres.

HUDSON & SLAYMAKER,
Att'ys for Def't.

[Endorsed:] No. 228. Disclaimer. Filed June 29, 1882. G. D. Gove, clerk, by J. D. Heed, dep'ty.

[Endorsed:] Copy of disclaimer.

[Endorsed:] 13434. Supreme Court U. S. 1891, October term. No. 294. James W. Kendall & *al.*, pl'ffs in error, *vs.* The San Juan Silver Mining Co. Stipulation and addition to record. Filed Mar. 16, 1892.

Office Supreme Court U. S.
FILED.
DEC 5 1891
JAMES H. McKENNEY,
CLERK.

— IN THE —

SUPREME COURT

— OF THE —

UNITED STATES

JAMES W. KENDALL.
ANNIE G. SHACKELFORD.
RUAH E. DICKENSON.
CAROLINE V. DICKENSON.
J. C. DICKENSON.
JOHN W. JACQUE.
Plaintiffs in Error

vs.

THE SAN JUAN SILVER MINING COMPANY.
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

E. T. WELLS,
R. T. McNEAL,
JNO. G. TAYLOR,
Attys. for Plaintiffs in Error.

COLLINS PRINT, 1418 & 1420 LARIMER.

— IN THE —

SUPREME COURT

— OF THE —

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BRIEF FOR PLAINTIFFS IN ERROR.

This is a controversy over a mining location situate in San Juan county, in the state of Colorado.

On the 3d day of September, 1872, two citizens of the United States, Kendall and Sacket, discovered and located on the public domain a lode mining claim, sunk thereon a discovery shaft disclosing mineral, posted the discovery notice and corner and side-line stakes, and recorded a location certificate, and from that time on they performed the annual labor required by the act of congress, up to the day of trial. They designated their claim as the Bear lode. The territory in which the location was made belonged to the Ute Indian reservation. On the 15th day of June, 1874, the treaty which ceded this land to the United States took effect, and the land became a part of the public domain of the United States, and was open to occupancy by mineral location by its citizens. As to what happened afterwards the stipulation is somewhat obscure; but with anything like a fair construction, it must be taken to mean that after this treaty went into effect, and this land became a part of the public domain, the locators of the Bear lode, that is, the plaintiffs in error, remained in possession of the ground in controversy, working and mining the same. It is expressly admitted also that after the extinguishment of the Indian title, they filed a new certificate of location. The plaintiffs in error have succeeded to the estate of Kendall and Sacket in this location.

On the 29th day of August, 1874, three citizens of the United States, Kallenberg, Wallace and Jackson, invaded the same ground known as Bear lode, and located it as unoccupied and unappropriated public mineral lands of the United States, and sought to make a lode mining location thereon, which they called the Titusville. It is conceded that in and about their efforts in this particular they complied with all the legal requirements necessary to make the location, if the ground was open to their location; both of these claims were worked by the different claimants from that time on until the institution of the suit which it is here sought to review.

The claimants of the Titusville lode applied for a patent, and the owners of the Bear lode filed their adverse claim, and supported the same by an action of ejectment in the state court.

This action was tried in the District court of the state upon a stipulation of facts, which will be found at page 14 of the printed record, and judgment was given for the defendants. This judgment was affirmed in the Supreme court of the state.

The errors assigned are as follows:

1.—The judgment of the District court of the county of San Juan ought to have been reversed.

2.—It appears by the record that the premises in controversy were located as a mining claim in the public domain, while included within the limits of a certain reservation set apart for the use of the Ute Indians, but that said Ute Indians ceded to the United States that part of said reservation including the premises in question in the month of March, 1874, and that after such cession the locators of said premises continued in possession thereof, occupying, working and improving the same, and claiming the same as a mining claim in the public domain; and that no claim or right of the defendant in error was initiated or asserted to said premises until about the month of August, 1874, nevertheless the Supreme court of the State of Colorado gave judgment in favor of the defendant in error, solely on the ground that at the date the premises were part of the Indian reservation, whereas, etc.

The only question to be determined by this court is the one presented by the stipulation of counsel filed in the District court, *i. e.*, where citizens, having located or attempted to locate a mining claim, or Indian reservation, and in that connection performed all the acts requisite to a legal appropriation of the ground, were the same unoccupied public domain, does their continued possession after the Indian title is extinguished, and their maintenance and adoption of such prior location validate the same as against others seeking to appropriate the premises? If this answered in the affirmative, the plaintiffs in errror were entitled to hold the ground in controversy against the defendants in error. They made the Bear location when it is conceded by every one that the ground was not open to entry or occupation; still they posted the discovery notice as the law required, they marked the boundary of the claim by putting substantial posts and land marks at each corner.

and in the centre of the side lines as the law required; they performed the annual expenditures as the law requires, and filed the location certificate with the clerk and recorder of the county in which the claim was situated as the law required.

In June, 1874, when this land was ceded to the government, and by it thrown open to exploration, use and enjoyment by its citizens, these plaintiffs were in possession of the same, working upon it and developing it and enjoying its fruits, maintaining and adopting the boundaries they had previously established in every particular, occupying it with all the *indicia* intact to evidence a mining location. They subsequently filed the certificate required in case of an original location. This was sufficient to entitle them to hold this ground as against the defendants. The fact of their remaining in possession, and maintaining and operating this claim, and thereby adopting all that had been done, was just as efficacious as making a new location. The defendants knew just as well as any one could know that the plaintiffs were there in the enjoyment of this property, and they have sought by straining a technicality to defeat the rights of plaintiffs in this regard. But it is not worth while to pursue any lengthy discussion of this question, as this court has already passed upon it.

Noonan vs. Caledonia Mining Co., (121 U. S. 393).

The facts and circumstances in the case at bar are on all fours with this case, and it is respectfully submitted that error is manifest in the ruling of the Supreme court of the state of Colorado.

E. T. WELLS.
R. T. McNEAL.
JNO. G. TAYLOR.
Attys. for Plaintiff in Error.

COLLINS PRINT, 1418 & 1420 LARIMER.

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Supreme Court of the United States.

October Term, 1891.

JAMES W. KENDALL et al.,
Plaintiffs in Error,
vs.
THE SAN JUAN SILVER MINING COMPANY.

No. 294.

In Error to the Supreme Court of the State of Colorado.

BRIEF FOR DEFENDANT IN ERROR.

A. T. BRITTON,
A. B. BROWNE,
Attys. for Defendant in Error.

WASHINGTON, D. C.
Gibson Bros., Printers and Bookbinders.
1892.

Supreme Court of the United States.

October Term, 1891.

JAMES W. KENDALL et al., Plaintiffs in Error, *v.* THE SAN JUAN SILVER MINING COMPANY.	*No.* 294.

Brief for Defendant in Error.

STATEMENT.

This is an action brought by plaintiffs in error in the District Court in and for San Juan County, Colorado, to determine the right of possession to certain mining premises situate in said County. The defendant in error filed application for U. S. mineral patent in 1880, in the proper local land office, for the "Titusville" lode claim, 1,500 feet in length by 300 feet in width. During the period of publication of notice thereof, prescribed by section 2325, U. S. R. S., plaintiffs in error filed adverse claim thereto, asserting prior and superior right to some 1,200 feet in length by about 150 feet in width of the premises thus applied for under location of the "Bear" lode claim.

Within the statutory period of thirty days thereafter they brought this action, prescribed by section 2326, U.S. R. S., "to determine the question of the right of possession."

Upon the pleadings, stipulation of facts, and disclaimer by defendant of right of possession to 1,200 feet by 50 feet in width of the premises in controversy, the trial court on June 29, 1882, rendered judgment for defendant for the remaining ground in controversy (Rec. 15, 16), which judgment on November 12, 1886, was affirmed by the Supreme Court of Colorado (Rec. 16) for the reasons assigned in the opinion of that court (Rec. 17–22). November 3, 1888 (or within nine days of expiration of the period allowed therefor), writ of error was prayed and allowed to this Court to review the latter judgment. The material facts disclosed by the record are:

That the premises in controversy are situate within the tract of country which, by treaty with the several bands of the Ute Indians proclaimed November 6, 1868 (15 Stats., p. 619), was "set apart for the absolute and undisturbed use and occupation of the Indians herein named," etc., and was not subject to occupation, location, or claim by white persons under the agricultural settlement or mining laws until extinguishment of such Indian title and reservation by treaty ratified by Act of Congress approved April 20, 1874 (18 Stats., part 3, pp. 36, 37, 38).

Answer, Par. VIII (Rec. 11), *Assignment of Errors* (Rec. 23, 24).

That during such period of Indian occupancy and reservation, plaintiff in error, James W. Kendall, with one S. Sacket, qualified citizens, entered therein, and on September 3, 1872, discovered and located the "Bear" lode, claiming 1,500 feet in length and 100 feet in width, and within twenty days thereafter properly monumented the same and recorded notice of such location in the office of the Recorder of the Las Animas mining district.

Complaint, Par. II, III, and IV (*Rec. pp.* 6, 7).

That after extinguishment of the Indian title and reservation, viz., August 29, 1874, defendant's grantors, qualified citizens, discovered and located the said "Titusville" lode claim, making requisite monumentation of corners, posting of notice, and recordation of claim in the proper Recorder's office.

Answer (Rec. 11, 12).

That on October 14, 1878, "part of the then owners of " the said Bear lode mining claim" "made out and filed in " the office of the Recorder of said County of San Juan, " State of Colorado, an *additional* certificate of location " of said lode, in which was claimed 150 feet in width on " each side of the centre of the vein of said claim, whereby " the said lines of said claim as originally located were " each extended 50 feet; wherefore these plaintiffs claim " to hold, occupy, and possess said lode with 150 feet " in width on each side of the centre of the vein on said " claim."

Complaint, Par. V (Rec. 7).

This was the first and *only* certificate of location made and recorded by plaintiffs in error or their grantors *after* extinguishment of the Indian title and reservation on April 30, 1874, *supra*, and over four years subsequent to the discovery, location, and recordation of the "Titusville" lode claim.

August 22, 1881, there was filed in the trial court the following stipulation (Rec. 14, 15):

"The following stipulation is agreed upon by and be-

" tween the parties, and testimony relating to the matters " herein referred to is waived, and may be dispensed with " upon the hearing and trial.

"I. It is admitted that the 'Bear' lode was located " September 3, 1872, and was duly recorded as stated in " the complaint. It is admitted by the defendant that all " the averments in paragraph II of the complaint are true, " excepting the averment that the Bear lode mineral claim " was at the date of its location 'a part of the public do- " 'main of the United States, and unoccupied and un- " 'claimed by any person, and was open to entry as min- " 'eral lands;' and excepting further that if the locators of " the Bear lode were entitled to make any such location " whatever of said premises or any part thereof, they were " not entitled on September 3, 1872, or any time prior to " June 15, 1874, to locate a claim exceeding fifty (50) feet " in width, and defendant therefore denies that plaintiffs " are entitled to more than fifty feet in width, if they are " entitled to anything.

"It is further admitted that an additional certificate of " location was filed, as stated in paragraph 5 of the com- " plaint.

"II. It is further admitted that on the 29th day of Au- " gust, A. D. 1874, A. H. Kallenberg, W. H. Wallace, and " J. G. Jackson located the 'Titusville' lode, and plaintiffs " admit that all the matters and things stated in paragraph " I of second defence and answer are true, excepting the " statement that said 'premises was then (August 29, 1874) " 'a part and parcel of the unoccupied and unappropriated " 'public domain of the United States,' which last aver- " ment plaintiffs do not admit.

"It is further admitted that since the respective loca- " tions of said 'Bear' and 'Titusville' lodes each of the " claimants and their grantors have duly done and per- " formed the annual assessment work, and neither party " shall be required to introduce testimony relating to the " annual expenditures required by law.

"It is further agreed that the defendant named is the " proper party defendant in this action, and that no proof " of its chain of title to the 'Titusville' lode or the pro-

" duction of conveyances or records showing such title
" shall be required."

June 27, 1892, there was also filed the following disclaimer (Rec. 26):

"Now, on this day, comes the defendant, by its attor-
" neys, Hudson & Slaymaker, and disclaims any right or
" title of possession to that part and parcel of those cer-
" tain premises described in the complaint of plaintiffs
" herein as constituting the 'Bear' lode, bounded and
" described as follows: Beginning at corner No. 3 X, Titus-
" ville lode, thence S. 22° 30′ W. 30.3 ft. to p't; thence N.
" 70° 15′ W. 1,191.37 ft. to p't; thence N. 19° 45′ E. 50 ft.
" to p't; thence S. 70° 15′ E. 774.88 ft.; thence S. 67° 30′
" E. 418.45 ft. to place of beginning, containing 1.278
" acres."

This disclaimer surrendered to the plaintiffs in error such portion of their claim upon the "Bear" lode, with surface width of 50 feet thereon, as by *such* boundaries came in conflict with the premises claimed by defendant under the "Titusville" location. The reason for such disclaimer and its complete recognition and protection of the rights of plaintiffs in error, which in any possible view of this case they could *lawfully* assert, will be hereinafter fully stated.

Thereupon the defendant moved the trial court "for
" judgment against the said plaintiffs in said cause and in
" its favor upon the pleadings, the stipulation as to facts
" agreed upon by the the said parties therein, and the dis-
" claimer filed by the defendant herein, for that as ap-
" pears by the said pleadings and said other papers on
" file in said cause the defendant is entitled to the pos-
" session of the premises *now* in controversy in this case."
(Rec. 15.)

Thereupon judgment was entered accordingly, and on appeal affirmed by the Supreme Court of the State, *supra*.

ARGUMENT.

I.

In the Supreme Court of the State the plantiffs in error contended that the stipulation of facts and disclaimer, *supra*, could not be considered in the nature of pleadings, but were cognizable only as evidence upon issue and trial, and that hence the trial court erred in entering judgment thereon upon the motion for judgment recited *supra*. This contention was overruled by the State Supreme Court. Inasmuch as this was a matter of State practice, involves no Federal question, and is not assigned for error here, the Court's determination upon that question is not reviewable here.

II.

The Court below held (Opinion, Rec. 20, 21) that the inclusion of the premises in dispute within the stated Indian reservation and the subsequent relinquishment of the Indian title, being contained in public acts and treaties, were matters whereof the courts take judicial notice, including as well the general boundaries affected thereby.

The correctness of this assumption, both as matter of fact herein and as matter of law, is conceded by plaintiffs in error in the sole assignment of error presented in this Court (Rec. 24). The sole contention here made is that whilst the "Bear" location was sought to be made when the premises were by reason of the Indian title and reservation withdrawn from claim and occupation under the mining laws, yet the plaintiffs in error *after* extinguishment of such Indian title and reservation continued in possession, "occupying, working, and improving the same, "and claiming the same as a mining claim in the public "domain of the United States under the Acts of Congress," &c., and *hence* have priority over the claim and location of the "Titusville" lode initiated *after* the Indian cession. And the sole argument adduced in support thereof is the citation of the decision of this Court in *Noonan* v. *Caledonia Mining Co.* (121 U. S. 393).

But the case cited has no application hereto. Its plain record facts, when put in opposition with those disclosed by this record, fully negative the assumption indulged by the other side.

From the recitals of the decision in the case thus cited the following facts appear:

1. That the premises in controversy were located in the Black Hills of Dakota, which, by treaty with the Sioux Indians ratified February 19, 1869, were included in a district of country thereby set apart for the exclusive use and occupation of said Indians.

2. That by subsequent agreement with said Indians, ratified by act of Congress on February 28, 1877, the lines of the reservation were changed, leaving out the Black Hills country, which thereby became "opened like other "public lands of the United States to exploration and "occupation under the mining laws."

3. That whilst the country was thus reserved for Indian use and occupation, the Caledonia and Bobtail lodes were located; that immediately after its stated release therefrom, viz., on March 15, 1877, the clâimants of the Caledonia made "an additional and supplementary claim and location of the Caledonia lode, and on the same day caused "a certificate or notice of the original claim and location, "as well as of the additional and supplementary claim

“ and location, to be recorded in the mining records of the
“ district.”

4. That by the recited efforts to secure extinguishment of the Indian title, beginning in 1875 and culminating with the treaty approved February 28, 1877, it was evident to the public that the reservation would soon be removed, and following the mineral discoveries therein in 1874 large numbers of persons entered upon the reservation and proceeded to appropriate mining ground and work and develop the mines.

From these premises of fact the Court, whilst expressly admitting the entry and claim of miners *prior* to the treaty of cession to be illegal, yet ruled *as applicable to the peculiar circumstances surrounding the Black Hills country*, as follows (115 U. S., pp. 402, 403):

> “The effect of the withdrawal of the district from the
> “ reservation, and the consequent end of the prohibition,
> “ was to leave the predecessors of the plaintiff exempt
> “ from liability to be disturbed for their unlawful entry
> “ on the land, and free to take measures under the mining
> “ laws for the perfection of their claims. Evidence of what
> “ had been done by them, the location of their claim, its
> “ extent, the amount of work done in its development, was
> “ competent, not as creating any absolute right to the
> “ property, but as showing the existence and condition of
> “ the property when their possession became lawful under
> “ the new agreement. Whether they should be protected
> “ in holding the property afterwards *depended upon their*
> “ *future compliance with the laws, statutory and mining,*
> “ *governing the possession and use of mineral lands in*
> “ *Dakota.* The rule laid down by the Supreme Court of
> “ the Territory is, in our judgment, the correct one which
> “ should govern cases of this kind, and that is
> “ substantially this: That where a party was in pos-
> “ session of a mining claim on the 28th of February,
> “ 1877, with the requisite discovery, with the surface

" boundaries sufficiently marked, with the notice of location posted, and with a disclosed vein of ore, he could, " by adopting what had been done, *causing a proper record* " *to be made*, and performing the amount of labor or making the improvements necessary to hold the claim, date " his rights from that day; and that such location and " labor and improvements would give him the right of " possession. By this rule substantial justice is done to " all parties who were entitled to protection in their mining claims when the new agreement took effect.

" Such proceedings were taken in this case by the owners " of the Caledonia mine. They *renewed* their location and " claim, making a record of their original claim and location and of the supplementary one in the proper mining " records of the district."

The essential conditions clearly prescribed by this decision (assuming its application hereto in any form) are—

1. Possession existing at date of extinguishment of the Indian reservation.

2. *Future* compliance with the laws, statutory and mining, governing the possession and use of mineral lands in the country where the premises are situate.

3. By "adopting what had been done, *causing a proper* " *record to be made*," improvements, etc., whereby alone the locator can "date his rights from that day," *i. e.*, extinguishment of the Indian reservation. The claimants of the Caledonia having done these things *after* the land was lawfully open to claim were given priority over Noonan, claimant of the Bobtail, who had failed to do so, *although the latter claim had been first located in fact during the existence of the Indian reservation.*

None of These Prescribed Conditions Appear by This Record as Done or Existing in Behalf of Plaintiffs in Error.

A.

Possession by the plaintiffs in error of the premises claimed as the "Bear" lode claim does not appear as existing at date of extinguishment of the Indian reservation or since. Whilst such claim of possession is made by the complaint (*Par.* III, Rec. 7), it is distinctly denied by the answer (Par. V, Rec. 10). The stipulation of facts (Rec. 14, 15) does not embrace any such admission. The recital therein is that "each of the claimants and their "grantors have duly done and performed the annual as-"sessment work, and neither party shall be required to "introduce testimony relating to the annual expenditures "required by law."

But this falls far short of establishing *possession* in the plaintiffs in error on June 15, 1874, when the treaty took effect vacating the Indian reservation, or on August 29, 1874, when the location of the "Titusville" lode, under which defendant in error claims, was made. The annual expenditure could have been made at any subsequent period in 1874 by the plaintiffs in error. The stipulation of fact covers only the *fact* that it was so made. It neither establishes continued possession or any actual possession existing in plaintiffs in error at any time prior to the location of the Titusville claim on August 29, 1874. And a possession commenced by trespass, and admittedly illegal in its inception, cannot be assumed to continue or become changed into a lawful possession in absence of direct proof or plain record admission.

B.

This record affirmatively discloses that the plaintiffs in error did *not*, after extinguishment of the Indian title and reservation, comply with controlling statutory requirements, nor attempt to cause "a proper record to be made," as thereby required, until years after the location of the "Titusville" lode under which defendant in error claims. And such subsequent location was neither in fact nor law effectual in any view to establish priority over the defendant in error.

It must be conceded that the attempted recordation of the "Bear" location in 1872, when the premises were embraced in the Indian reservation, was ineffectual to create any right, and was wholly void. The premises were not open to location; the record was not authorized but prohibited by law.

As held by this Court in *Belk* v. *Meagher* (104 U. S. 279, 284):

> "The right of location upon the mineral lands of the "United States is a privilege granted by Congress, but "it can only be exercised within the limits prescribed by "the grant. A location can only be made where the law "allows it to be done. Any attempt to go beyond that "will be of no avail. * * *
>
> "The right to the possession comes only from a valid "location. Consequently, if there is no location there can "be no possession under it. Location does not necessarily follow from possession, but possession from location. A location is not made by taking possession alone, "but by working on the ground, recording, and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations. As in this "case all these things were done when the law did not "allow it, *they are as if they had never been done.*"

Hence the attempted record of location in 1872, we repeat was a nullity, and the later decision in *Noonan* v. *Caledonia Mg. Co., supra*, expressly holds that the claim and possession from the date when the premises became open to location is dependent solely on *future* compliance with law, and "causing a *proper* record to be made," &c. And the Court's conclusion therein is emphasized by the fact that the opposing claim, although located earlier than the Caledonia and while the land was reserved, was *not* so renewed, and hence was denied recognition.

The record sought to be made during the existence of this Indian reservation being therefore a nullity and all rights of the plaintiff in error being dependent on *future* compliance with law, brief recital of the statutory requirements in this regard and the total failure of the parties to comply therewith will demonstrate that the claim of plaintiffs in error had no legal existence on August 29, 1874, when the location of the Titusville claim was made under which the defendant in error holds.

The Federal Mining Act of May 10, 1872, now U. S. R. S., sec. 2324, makes the manner of location and recording subject to the laws of the State or Territory and the regulations of each mining district not in conflict therewith. Hence resort to the laws of Colorado is requisite to ascertain what was required to be done by the plaintiffs in error in order to establish their claim on the "Bear" lode or give it any validity *after* extinguishment of the Indian reservation. Such reservation was so extinguished by Act of Congress, approved April 29, 1874 (18 Stats., chap. 136, p. 36). An act of the Legislature of Colorado, approved on February 13, 1874, requires:

> "SEC. 3. The discoverer of a lode shall within three "months from the date of discovery record his claim in "the office of the Recorder of the County in which such "lode is situated, by a location certificate which shall "contain: 1st. The name of the lode. 2d. The name of "the locator. 3d. The date of location. 4th. The number of feet in length claimed on each side of the centre "of discovery shaft. 5th. The general course of the lode "as near as may be.

"SEC. 4. Any location certificate of a lode claim which
" shall not contain the name of the lode, the name of the
" locator, the date of location, the number of linear feet
" claimed on each side of the discovery shaft, the general
" course of the lode, and such description as shall identify
" the claim with reasonable certainty, shall be void."

Session Laws 1874, *p.* 185; *General Laws of Colorado*, 1877, *p.* 629.

The premises in controversy became open to location from April 29, 1874, and the three months limitation of time by the State Act, *supra*, within which the location and record thereof should have been perfected, therefore expired *before* August 29, 1874, when the location of the Titusville lode was made and duly recorded. Having thus failed to comply with the law, the plaintiffs in error cannot justly be heard to say that their wrongful entry on the premises during existence of the Indian reservation should, notwithstanding their plain neglect of statutory requirements, operate in their favor and against parties who went upon the premises after they had been lawfully opened as part of the public domain, made proper location and record thereof, and in all respects conformed to the requirements of law. There is nothing in the Caledonia case cited, *supra*, to justify such conclusion. There the Caledonia claimants had promptly renewed their location and record thereof before the intervention of any prior adverse right, and Noonan had failed to do so, although his location made during the pendency of the Indian reservation was, in point of fact, prior in time to the Caledonia location made during the same period. From this *resumé* of the law and record facts in this case it thus clearly appears that the case for the plaintiffs in error does not fall within the doctrine of the Caledonia case, *supra*, but wholly fails to meet the plain requirements therein laid down.

III.

But independent of all question of Indian reservation, it is equally plain that the plaintiffs in error are not entitled to recover judgment. Even if we assume that the premises in question were part of the public domain at the time of their location in 1872, it still remains that the disclaimer filed by the defendant in the trial court excluded from the controversy the entire conflict (1,200 feet) by surface width of fifty (50) feet, and thereby yielded to the plaintiffs in error all which, within the law, they were justly entitled to hold. This will be apparent from the following considerations.

The Federal Mining Law, U. S. R. S., sec. 2320, establishes the maximum length of a location at 1,500 feet in width along the vein or lode. The section adds:

"No claim shall extend more than 300 feet on each side "of the middle of the vein on the surface, nor shall any "claim be limited by any mining regulation to less than "twenty-five feet on each side of the middle of the vein "at the surface, except where adverse rights existing "on the 10th day of May, 1872, render such limitation "necessary." This section is taken from the Mining Act of Congress of May 10, 1872. The original Mining Act approved July 26, 1866 (14 Stats., chap. 262, p. 251), contains no provision fixing the minimum or maximum width of surface ground, all that being left to the operation of State and Territorial law or mining regulations.

An act of the Legislature of Colorado entitled "An act "concerning lode claims," approved November 7, 1861 (*Session Laws*, *p.* 166, *R. S. of Colorado, approved December* 2, 1867, *p.* 465), provides on this head as follows:

"SECTION 1. That the term claim as used in the mining "portion of this Territory, when applied to a lode, shall be

“ construed to mean one hundred feet of the length of
“ such lode, surface measurement, of the entire width of
“ such lode or crevice : *Provided*, That in no case where
“ the regulations of any mining district have heretofore
“ defined the term claim to mean other than as above
“ defined, nothing in this act shall be so construed as to im-
“ pair the rights of any person or persons holding claims
“ under such regulations as may have been heretofore
“ established by the people of the district in which such
“ claim or claims are situated.”

This act continued as the law of Colorado until the passage of an act, approved February 9, 1866, entitled “ An act concerning Mines and Minerals.” (*Session Laws* 1866, *R. S. of Colorado, approved December* 2, 1867.) Section 4 thereof provides :

“ On all mineral lodes or veins of gold-bearing ores, or
“ of silver or other valuable minerals in this Territory, the
“ owner or owners of all such deposits shall, by virtue
“ of priority of discovery, be deemed and held to be the
“ owner or owners of all spurs, off-shoots, dips, angles,
“ feeders, cross or parallel veins of any character or
“ name whatsoever, lying and being within the limits of
“ twenty-five (25) feet in either direction *from the centre*
“ *of said first discovered lode or vein.*”

This was the law in force when the plaintiffs in error made their attempted location in September, 1872. Under this law they were plainly restricted to a surface width of fifty (50) feet. Notwithstanding this limitation, however, they attempted to claim one hundred (100) feet for surface width. Their location in any view, was, therefore, manifestly void for the excess width taken beyond this express limitation of the statute.

Richmond M. Co. v. *Rose,* 114 U. S. *pp.* 576, 580.
Jupiter M. Co. v. *Bodie Con. M. Co.*, 7 *Saw. pp.* 96, 107, *and* 11 *Fed. Rep.* 666.

In this situation it was manifestly lawful for the claimants of the Titusville lode to embrace within their location that portion of the surface width of the location made by the plaintiffs in error which was thus in excess of the statute and void. We append a diagram showing the relative location of these two claims, giving in solid coloring the fifty (50) feet of surface width which in any possible view (and irrespective of any question of Indian reservation) could be lawfully claimed by the plaintiffs in error, and to which portion of the premises the defendant filed disclaimer.

Assuming, then, the case of plaintiff in error to stand in the most favorable view, this disclaimer gives them all which they could claim under the law, and this notwithstanding they had not made lawful location, and did not, upon removal of the Indian reservation, proceed to comply with the plain and mandatory provisions of the statute.

As shown by this record, the plaintiffs in error made no attempt to record their claim when such recordation would have been authorized by law until on October 14, 1878, when, as the complaint expressly recites (Rec. p. 7), they filed "an additional certificate of location" for the purpose of taking an additional fifty (50) feet of surface width, and claiming thereunder from that date a surface width of one hundred and fifty (150) feet. This was manifestly sought to be done under the act of the Colorado Legislature, approved February 13, 1874 (*Session Laws* 1874, *p.* 185, *General Laws of Colorado*, 1877, page 629), which by sections one and two provides:

"*Be it enacted by the Council and House of Representatives of Colorado Territory*, The length of any lode " claim hereafter located may equal, but not exceed, fif- " teen hundred (1,500) feet along the vein.

"SEC. 2. The width of lode claims hereafter located in

"Gilpin, Clear Creek, Boulder, and Summit Counties shall "be seventy-five (75) feet on each side of the centre of the "vein or crevice; and in all other Counties the width of "the same shall be one hundred and fifty (150) feet on "each side of the centre of the vein or crevice: *Provided*, "That hereafter any County may, at any general election, "determine upon a greater width not exceeding three hundred (300) feet on each side of the centre of the vein or "lode, by a majority of the legal votes cast at said election, and any County by such vote at such election may "determine upon a less width than above specified."

But four years prior to this attemped location by plaintiff in error, made solely to secure this enlarged surface width, the ground had already been taken up by the Titusville location, which this record concedes was made in due form and under which the defendant in error claims. In the face of this adversary right the attempt of plaintiff in error to thus expand their claim was forbidden by section 13 of this same act of February 13, 1874, *supra*, which provides as follows:

"SEC. 13. If at any time the locator of any mining claim "heretofore or hereafter located or his assigns shall apprehend that his original certificate was defective, "erroneous, or that the requirements of the law had not "been compiled with before filing, or shall be desirous of "changing his surface boundaries or of taking in any part "of an overlapping claim which has been abandoned, or "in case the original certificate was made prior to the "passage of this law and he shall be desirous of securing "the benefits of this act, such locator or his assigns may "file an additional certificate, subject to the provisions of "this act: *Provided*, That such relocation does not interfere "with the existing rights of others at the time of such relocation, and no such relocation or the record thereof "shall preclude the claimant or claimants from proving "any such title or titles as he or they may have held "under previous location."

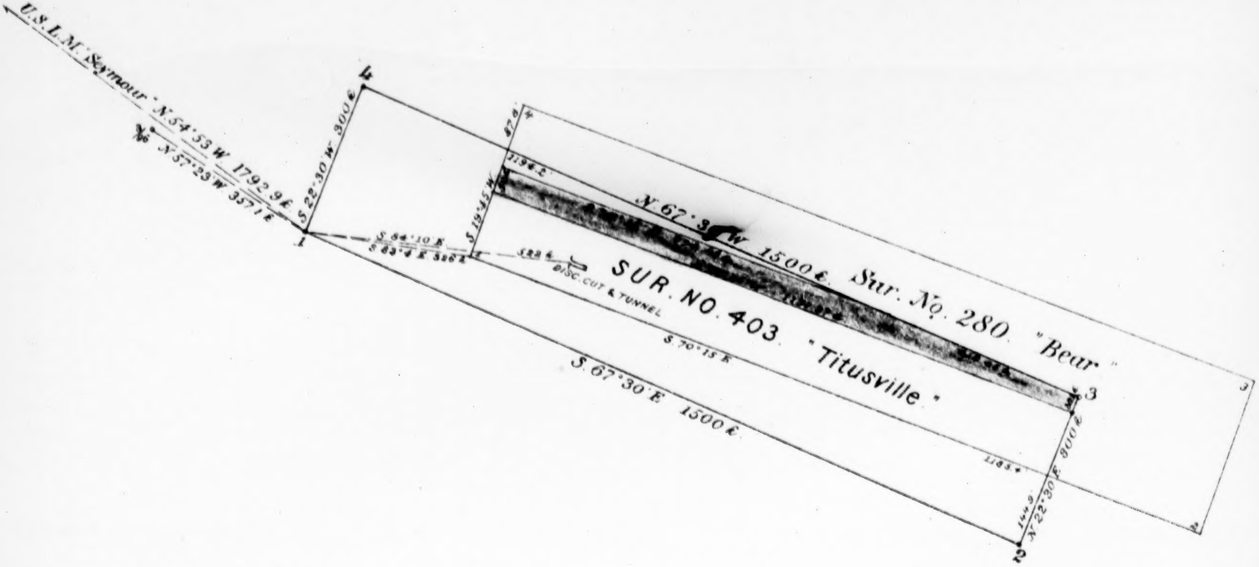
That this point was fully raised both in the trial court and in the Supreme Court of the State appears by the express recital of the stipulation of facts (Par. I, Rec. 14), and the statement of the case and the questions involved therein as set forth in the opinion of the Supreme Court of the State (Rec. 19).

Whilst the Supreme Court of the State decided the case upon the ground that the premises were not open to location when the plaintiffs in error made entry, and hence their entire claim was void, yet we are justified in pressing upon the Court this proposition in the possible view that the ruling heretofore made in the Caledonia case may be held to control the judgment of the court below in this case upon the point decided by that court. In such view it is therefore beyond question that, assuming the case for plaintiff in error in its most favorable light, their location must be restricted to a surface width of fifty (50) feet "from the centre of said first discovery lode or vein." The defendant in error having disclaimed all right to the ground in controversy for this surface width by the entire length of the conflict, it is manifest the judgment below was correct, and on this ground should be affirmed.

We ask that the judgment below be affirmed.

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
Attorneys for Defendant in Error.



Scale of 200 feet to an inch.